than 7 auctions were conducted which all proved to be abortive as there were no bidders. Prior to 1986, the decision of *Ng Yik Seng & Anor. v Perwira Habib Bank Malaysia Berhad* was good law but after 1986, the plaintiff did prosecute this action by filing a notice of intention to proceed against the third defendant's co-guarantor, the fourth defendant in these proceedings. In any event, during the period of 1986 - 1989, if the charged property had been auctioned off, the proceeds would be more than sufficient to relinquish the third defendant's liability under the guarantee. The third defendant was all too aware of this and had pleaded so as his defence. As such, he cannot now complain that by not prosecuting this action until 1989, his position had been jeopardised.

The third defendant's liability is founded on the guarantee he executed on 30 June 1980, in respect of facilities granted by the plaintiff to the borrower. The liability of the borrower as the principal debtor has been established, as seen from the foreclosure proceedings and is in no way disputed by the third defendant. As such, proof of the third defendant's liability is confined to documentary evidence and to that extent, the delay that had occurred since the filing of these proceedings will not be in any way prejudicial to him. In any event, he can claim contribution from his co-guarantors.

The fact that he is a public figure threatened by this action above his head, is neither here nor there, for as a public figure, the third defendant must all be too aware of the consequences of his action in consenting to be a guarantor in the first place. On the facts of this case, I consider that the third defendant had not been in any way prejudiced by the long delay that had occurred.

For the reasons that I have given, I had accordingly dismissed the third defendant's appeal with costs.

THE BOARD OF TRUSTEES OF THE ATHI EESWARAN TEMPLE

v.

P. SANTHIRASEGARAM

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. S7-22-726-1990]
15 MAY 1992

PRACTICE & PROCEDURE: Interlocutory injunction - Order of court granting interlocutory injunction - Application to set aside and for ancillary reliefs granted - Whether application for reliefs in respect of prayers (ii) for damages and (iii) for injunction should have been entertained by the court.

The plaintiffs applied for an order by way of summons-in-chambers (ex-parte) on a certificate of urgency for an interlocutory injunction to prevent the defendant, the president of the board of trustees of the Eeswaran Temple, from threatening their members, entering their office or carrying out their functions, and an interlocutory mandatory injunction that the defendant unlock the plaintiffs' office and return all documents and other things taken from the office and return all documents and other things taken from the office. The application was supported be an affidavit affirmed by one Patmanathan a/l Ayadurai ('A Pathmanathan'), who claimed to be the honorary secretary of the plaintiffs. An order dated 28 November 1990 in terms of the application was granted, with liberty for the defendant to set aside the order within 14 days.

The plaintiffs duly filed their writ and statement of claim dated 30 November 1990 for a permanent injunction and damages against the defendant.

On 11 December 1990, the defendant filed an application by way of summons-in-chambers to set aside the order dated 28 November 1990, and for reliefs against A Pathmanathan, that

(ii) he be ordered to pay damages and expenses suffered by the defendant, that
(iii) he should cease from acting as acting as representative of the board of trustees of the Athi Eeswaran Temple, and that
(iv) he be taxed the costs of the application.

The application came on for hearing on 21 January 1991. An order in terms of the defendant's application was allowed. The plain-

tiffs applied for further argument in open court pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980.

On 28 January 1991, the defendant entered a conditional appearance and applied to strike out the writ on the ground that the plaintiffs' conduct was unfair and oppressive and prejudicial to the defendant's right, that the plaintiffs had not acted in good faith. For although the plaintiffs had moved the court ex-parte during the court vacation to grant an injunction, and had extracted the relevant sealed order, and although they had filed a writ and statement of claim five days later, they had not served the writ and statement of claim, which they had filed 5 days later, on the defendant.

The plaintiffs' application for further argument came for hearing on 30 July 1991. In their written submission, the plaintiffs argued:

(ii) that prayer should not have been granted as A Pathmanathan was not a party to the proceedings, and that

(iii) prayer too should not have been granted for the same reason, and also that there was no cause of action upon which the injunction was based, as at the material time no defence had been filed by the defendant nor a counter claim made. On the other hand, the defendant claimed:

(a) that plaintiffs' omission to serve the writ of summons and statement of claim within 14 days indicated bad faith on their part,
(b) that prayers (ii) and (iii) were reasonable and necessary, and were made by consent,
(c) that the order of 21st January 1991 could be made without a counterclaim, that the matter was res judicata and that issue estoppel operated, and that the court was functus officio
(d) that the defendant could seek damages against A Pathmanathan and
(e) that s. 11 of the Athi-Eeswara Temple Enactment 1941 of the State of Selangor ('the 1941 Enactment') did not save A Pathmanathan from liability.

Held:

Prayers (ii) and (iii) appearing in the defendant's application dated 11 December 1990 to set aside the order of the court dated 28 November 1990 should not have been entertained.

[1] The question of *locus standi* of the plaintiffs could not be resolved at the the present proceedings, particularly in view of the conflicting evidence.

A Pathmanathan was not a party to the action, and the court had no jurisdiction to make any order binding on persons who were not parties to the proceedings. A Pathmanathan merely affirmed an affidavit in support of the plaintiffs' application for the interlocutory injunction, in his capacity as the honorary secretary of the board of trustees. Finally, and more importantly, he gave an undertaking in respect of damages not in his personal capacity but on behalf of the plaintiffs.

[2] The defendant's application for an interlocutory injunction pursuant to prayer (iii) should not have been entertained. There was no cause of action upon which the defendant could possibly peg the relief prayed for by him. An interlocutory injunction may be granted a defendant against a plaintiff before any counterclaim has been served, but in such circumstances, the defendant will be required to give an undertaking to serve a counterclaim or to issue a separate writ in respect of his cross-claim once the plaintiff has served his statement of claim. The court will grant an interlocutory injunction only to support a legal right. In the present case, the defendant had failed to give any undertaking.

[3] The defendant's submission on all the points must be rejected.

(a) The plaintiffs had filed the writ and statement of claim within reasonable time and the delay in effecting service was not entirely due to the fault of the plaintiffs and they should not be penalised.
(b) There was no evidence at all of the plaintiffs having ever made any concession in respect of prayers (ii) and (iii). In any case, the plaintiffs' submission on prayers (ii) and (iii) could not be ignored at the hearing of further arguments. Order 56 r. 2 of the Rules of the High Court 1980 empowers the court to make such order as it feels just after hearing further arguments.

(c) The principle of res judicature and issue estoppel had no application whatsoever. The order of the court dated 21 January 1991 was not an order made by consent. Furthermore, the court was not functus officio after making the order of 21 January 1991 on a hearing in chambers. The order was not a final order, but subject to review pursuant to O. 56 r. 2 of the Rules of the High Court, if the court deemed it fit to hear further arguments on the matter, as it had done in the present case.

(d) The defendant, as the president of the board of trustees, in asking for damages against the plaintiffs, his own board, was in fact prejudicing the very issue that could only be resolved at the trial of the case proper. Furthermore, the question as to who were actually the members of the board was not a straightforward question to which an answer could be found at the present interlocutory stage, particularly in view of the conflicting evidence.

(e) Though it cannot be disputed that s. 11 of the 1941 Enactment is a saving provision only for a member of the board of trustees, in view of the allegations, counter-allegations, claims and counterclaims, it was not possible to find an answer to the question at the present stage as to whether at the material time A Pathmanathan was a honorary secretary/treasurer of the board.

[The order of the court dated 21 January 1991 to be varied accordingly].

Cases referred to:

Toh Seak Keng v. Lim Huang Cheow & Ors. [1989] 2 MLJ 492 @ 494 ***(foll)***

Toh Seow Ngan & Ors. v. Toh Seak Keng & Ors. [1990] 2 MLJ 303 @ 304 ***(cit)***

Marcus Publishing v. Hutton-Wild Communications, The Times, 31 October 1989 ***(cit)***

Siskina v. Kistos Compania Naviera S.A. [1977] 2 MLJ 492 @ 494 ***(cit)***

P.S. Refson & Co. Ltd. v. Saggers & Anor. [1984] 3 All ER 111 ***(cit)***

Hytrac Conveyors Ltd. v. Conveyors International Ltd. [1982] 3 All ER 415 ***(dist)***

Merchant Bankers v. Dhanoa Sdn. Bhd. [1991] 1 CLJ 769 ***(dist)***

Simmons v. Liberal Opinion Ltd. [1981] KBD 966 ***(cit)***

Chin Kwong Construction Sdn. Bhd. v. Sunrise Tower Sdn. Bhd. [1986] 2 MLJ 41 ***(cit)***

Wenlock v. Moloney [1965] 2 All ER 871 ***(refd)***

Montgomery v. Montgomery [1965] p. 46 ***(foll)***

Gouriet v. Union of Post Office Workers [1977] 3 All ER 70 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 56 r. 2, 2(2)

For the Plaintiffs - Ambiga Sreenevasan; M/s. Skrine & Co.

For the Defendant - Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Lim Beng Choon J:

On 27 November 1990 the board of trustees of the Athi-Eeswaran Temple, the plaintiffs, applied by way of summons-in-chamber *(Ex-parte)* for an interlocutory injunction to prevent P. Santhirasegaram, the defendant, and/or his agent and representatives from:

(a) threatening the members of the plaintiffs or their representatives and/or agents;
(b) entering the office of the plaintiffs in the Athi-Eeswaran Temple ("the said Temple") without the permission of the plaintiffs;
(c) carrying out the functions and/or duties of the plaintiffs.

The plaintiffs also prayed for an interlocutory mandatory injunction to compel the defendant to open the lock which he had used to lock up the office of the plaintiffs and return all documents, money and other things which he took from the said office. The application of the plaintiffs is supported by an affidavit affirmed on 27 November 1990 by one Patmanathan a/l Ayadurai ("A. Patmanathan") who claimed to be the honorary secretary of the plaintiffs. He deposed that the board of trustees of the said temple was established by the Athi-Eeswaran Temple Enactment 1941 of the State of Selangor ("the 1941 Enactment") and that the defendant was previously a member of the board of trustees of the said Temple whose tenure of office expired on 28 February 1990. He alleged that on 19 November 1990 the defendant together with his agent or servant committed trespass on the said temple and without authority entered the office of the plaintiffs and broke a mirror in the said office. The defendant thereafter proceeded to carry out a religious ceremony in the said temple without permission. Apparently when two members of the

plaintiffs tried to stop the unauthorised ceremony, he claimed that the defendant threatened them and as a result the said two members made a report to the police (see the report annexed as Exhibit 'PA1' to the affidavit). The deponent of the affidavit also made a report to the police (see the report annexed as Exhibit 'PA2' to the affidavit). Thereafter the defendant was said to have locked up the door of the said temple. On 20 November 1990 at about 7.30 p.m. some members of the plaintiffs were able to unlock the door of the said temple but on the same night at about 11 p.m. the defendant with the assistance of the police again locked up the door of the said temple. The defendant was able to enlist the assistance of the police by making use of a letter written by the attorney general who, according to A. Patmanathan, purported to appoint two members of the Board of Trustees of the said temple pursuant to the 1941 Enactment. To support the application of the plaintiffs for an injunction, A. Patmanathan claimed that a member of the plaintiffs had been informed by one Gunaratnam, an agent of the defendant that a religious ceremony scheduled to be carried out in the temple would be obstructed or inteferred with by the defendant or his agents. As a result he claimed *inter alia* that unless an injunction was granted to prevent the defendant from trespassing on the said temple, the plaintiffs would not be able to carry out their functions and duties as they had been threatened. A. Patmanathan on behalf of the plaintiffs ("bagi pihak plaintif") thereby gave the usual undertaking regarding damages should the defendant suffer any damage due to any wrongful grant of an injunction to the plaintiffs. He finally claimed that the plaintiffs would be filing a writ and statement of claim to ask for an order of permanent injunction and damages against the defendant. The plaintiffs' solicitors, one T. Gunaseelan of M/s. Wan Majid and Mano, also filed in a Certificate of Urgency on 27 November 1990 in support of the plaintiffs' application for the interlocutory injunctions.

When the plaintiffs' aforementioned application came on for hearing on 28 November 1990, this court made an order in terms of the application on the same day with liberty for the defendant to set aside the order within 14 days from the date of the order.

The plaintiffs duly filed their writ and statement of claim dated 30 November 1990 against the defendant. I do not propose to set out the averments made therein unless they are, in my view, relevant to this interlocutory proceeding.

On 11 December 1990 the defendant through his solicitors M/s. Yusof Lee Pathma and Marbeck filed in an application by way of summons-in-chambers to set aside the Order of the court dated 28th November 1990. In addition he also asked for the following reliefs:

(ii) Pathmanathan a/l Ayadurai do pay the defendant all damages and expenses he has suffered to be assessed by the senior assistant registrar of this honourable court;
(iii) Pathmanathan a/l Ayadurai and or his agent purporting to represent the board of trustees of the Athi Eeswaran Temple, Sentul do forthwith cease and desist from so acting or representing;
(iv) the costs of this application be taxed and paid by Pathmanathan a/l Ayadurai to the defendant;.

The defendant's application is supported by an affidavit affirmed by him on 10 December 1990 and a joint affidavit affirmed by Tan Sri Dato' (Dr.) C. Sinnadurai, V. Gunaratnam, E. Thavanagam and S. Ratnasingam ("the joint affidavit") on the same day.

In his affidavit, the defendant claimed *inter alia* that he was currently the President of the Board of Trustees of the said temple being elected to that post by a resolution of the board from amongst its members made according to s. 5(vi) of the 1941 Enactment. He also said that the other four members of the board of trustee of the said temple were:

(i) Tan Sri Dato' (Dr.) C. Sinnadurai
(ii) Mr. V. Gunaratnam
(iii) Mr. E. Thavanayagam
(iv) Mr. S. Ratnasingam.

He then went on to state that while Tan Sri Dato' (Dr.) C. Sinnadurai and Mr. V. Gunaratnam were also duly elected presumably under the 1941 Enactment, Mr. E. Thavanayagam and Mr. S. Ratnasingam were appointed on the 8 November 1990 by the attorney general pursuant to s. 5(v) of the 1941 Enactment. He denied that his term of office expired on February 1990 as claimed by A. Patmanathan as he was re-elected to the board of trustees of the said temple for a further period of two years effective from 28th Febru-

ary 1990 at a meeting of the said board held on 15th December 1989. He produced what he claimed to be minutes of the said meeting which is annexed as Exhibit J2 to his affidavit. Likewise Tan Sri Dato' (Dr.) C. Sinnadurai and Mr. V. Gunaratnam were also re-elected to the said board on 15th December 1989. He alleged that A. Patmanathan had seriously and materially misled the court in purporting to be a member of the board of trustees of the said temple and commenced proceedings in the name of the board and that the office of secretary-general which he had conferred on himself was non-existent. He further claimed that the religious ceremony conducted by him on 19th November 1990 was conducted lawfully in his capacity as the President of the Board of Trustees. It was conducted so he claimed in order that Mr. E. Thavanayagam and Mr. S. Ratnasingam could take the solemn oath of office as required under s. 4(ii) of the 1941 Enactment. It was A. Patmanathan together with Mr. T. Kandasamy and Mr. M. Nalliah who attempted to prevent him from conducting the said ceremony and the two new appointees from taking the prescribed oath of office. He also admitted that he did *inter alia* show the police the letter from the attorney general appointing the two appointees to the board of trustees of the said temple. He then alleged that A. Patmanathan and his supporters tried, albeit in vain, to influence the attorney general to withdraw recognition of the duly appointed board of trustees. He went on to say that A. Patmanathan had purported to act on behalf of the board of trustees when he clearly had no right or power. He further alleged that A. Patmanathan and his supporters had never been duly appointed as members of the board of trustees.

By the joint affidavit the deponents generally confirmed the assertions of the defendant. They however added that A. Patmanathan and the members of the purported board of trustees were all relatives of the late Dr. Arumugam, the founder of the said temple. Hence A. Patmanathan and the said relatives had ambitious designs to wrest the management of the said temple for themselves in violation of the 1941 Enactment. The deponents further asserted that in the interest of the public in general and the Hindu populace in particular they, being duly and lawfully appointed board of trustees under the 1941 Enactment be permitted to continue to carry on its work as it had done since its inception.

A. Patmanathan went on to affirm an affidavit-in reply on 16th January 1991 to dispute the version set out in the defendant's affidavit and supported by the four so-called members of the board of trustees of the said temple. In the affidavit-in-reply he particularly denied the allegations made by the defendant and in addition asserted that he had the authority of the plaintiff to institute this action on behalf of the plaintiffs. He further claimed that the duly appointed priest of the temple never took part in the unauthorised religious ceremony held on 19th November 1990. Finally he said that the defendant tried to mislead the attorney general when the latter wrote to the defendant's supporters on 12th December 1990 concerning the complaint lodged by the solicitors of the plaintiffs concerning the appointments of E. Thavanagam and S. Ratnasingam as members of the board of trustees. As a result, the attorney general required the plaintiff to explain.

Navaratnam s/o Peethamparam (P. Navaratnam) also affirmed an affidavit on 17th January 1991. In his affidavit he claimed that the following were the duly appointed members of the plaintiffs:

(i) P. Navaratnam - President
(ii) Patmanathan - Honorary Secretary/Treasurer
(iii) Dato T. Tharu Magnanam
(iv) Dr. V. Visureswaran
(v) T. Kandasamy

Furthermore the appointment of E. Thavenayagam and S. Ratnasingam as members of the plaintiff was still under consideration by the attorney general. He then went on to deny the allegations made by the defendant and supported by the four deponents of the joint affidavit. He asserted that the purported minutes of the meeting produced by the defendant as Exhibit S-2 were false. To show that the defendant failed to carry out his duties during the period that he was made a treasurer of the board of trustees, he claimed that the defendant, during that period, failed to keep proper account of the said board of trustees. In fact the defendant took steps to conceal the account of the board.

Further affidavits were also filed by Visvalingam a/l Selvadurai and Dato Tharmagnanum s/o R. Thanbial on 18th January 1991 who claimed to be members of the plaintiffs and who supported the version as related by A. Pathmanathan in his affidavit.

On 28 January 1991 the defendant with leave of the court entered a conditional appearance and proceeded to apply by way of summons-in-chambers to strike out the writ by which the plaintiffs instituted this action. The main ground as contained in the affidavit-in-support affirmed by the defendant on 9th February 1991 was that the plaintiffs initiated this action by filing only an *ex-parte* summons-in-chambers during court vacation and did not file a writ or statement of claim but instead they asserted that because of extreme urgency or exceptional circumstances of the case it would file the writ and statement of claim later. Although the plaintiffs had claimed to have filed the said writ and statement of claim on or about 3rd December 1990 that is, five days after the issue of the *ex-parte* order of the court they never served the said writ and the statement of claim on the defendant. The excuse given was that they were not able to extract a sealed copy of the same because the court was delaying the sealing and extraction. The defendant then went on to question the good faith of the plaintiffs by saying that since the plaintiffs were able to move the court *ex-parte* on the same day during the court vacation to grant an injunction and extracted the relevant sealed order, they should not sit back complacently without taking steps to serve the defendant with the basic documents to enable the defendant to defend the claim. The plaintiffs' conduct was unfair and oppressive and prejudicial to the defendant's right.

Prior to the defendant filing the aforesaid application to strike out the writ of the plaintiffs, the application of the defendant dated 11th December 1990 (enclosure 6B) to set aside the order of the court dated 28 November 1990 and his prayers for the ancillary reliefs as adumberated earlier came on for hearing on 21st January 1991. At the hearing, Counsel for the plaintiffs/respondents applied for an adjournment of the hearing on the ground that some members of the plaintiffs had just taken leave to go abroad. Counsel for the defendant/applicant objected against the grant of any adjournment. I rejected the application of the plaintiffs/respondents as I was of the view that since the plaintiffs had obtained an injunction *ex-parte* on a certificate of urgency it should be prepared to proceed with the hearing for if it were otherwise grave injustice would have been done to the defendant. In the course of submitting, Counsel for the defendant/respondent directed his submission to the question of the failure on the part of the plaintiffs to disclose all relevant facts and that the plaintiffs had failed to file the necessary writ in spite of their undertaking to do the same. Counsel for the plaintiffs/respondents on the other hand submitted that the plaintiffs had disclosed all relevant facts and that they had filed the necessary writ with a statement of claim within time but they were not able to obtain a sealed copy of the same due to some delay caused by the registry staff of the court. After hearing both Counsel I allowed an order in terms of the defendant's application enclosure 6B.

The solicitors for the plaintiffs thereupon wrote in for further argument in open court pursuant to O. 56 r. 2(2) of the Rules of the High Court 1980 as the plaintiffs apparently were not satisfied with my decision given in chambers on 21st January 1991. I allowed the plaintiffs' application for further argument in open court.

When the matter came on for hearing on 30 July 1991, with the consent of both Counsel, I directed them to file in their respective written submissions which they did.

In his written submission Counsel for the plaintiffs stated that the plaintiffs would not wish to deal with the issue of the setting aside of the injunction but would only address arguments in respect of prayers (ii) and (iii) as set out in the defendant's summons-in-chambers dated 28th November 1990 which I have reproduced above. Counsel then went on to argue that prayer (ii) should clearly not have been granted as A. Patmanathan was not a party to the proceedings and he cited the case of *Toh Seak Keng v Lim Huang Cheow & Ors.* [1989] 2 MLJ 492 @ 494 and also the case of *Toh Seow Ngan & Ors. v Toh Seak Keng & Ors.* [1990] 2 MLJ 303 @ 304 to support his argument. Furthermore s. 11 of the 1941 Enactment which provides "no member of the board shall be personally liable for or in connection with any act or omission done or committed in good faith and without gross negligence as such member of the board" precluded such order being made against A. Patmanathan. Likewise prayer (iii) should not have been granted for the same reason that A. Patmanathan was not a party to the proceeding and more importantly there was no cause of action upon which the injunction was based. This was so because (so sub-

mitted Counsel) at the material time no defence had been filed by the defendant nor a counter-claim made. Counsel asserted that clearly in law a counter-claim was essential to sustain an injunction and he cited *Marcus Publishing v. Hutton-Wild Communications*, The Times 31 October 1989, and *Siskina v. Kistos Compania Naviera S.A.* [1977] 2 MLJ 492 @ 494 to support his contention.

By his written submission, Counsel for the defendant raised five points for my consideration:

(1) The omission on the part of the plaintiff to serve the writ of summons and statement of claim together with the order of court dated 28th November 1990 at most within 14 days thereafter indicated bad faith on their part and an abuse of process of court particularly when the defendant was placed in a situation when he could not enter an appearance but under pain of being out of time to apply by way of summons-in-chambers dated 11th December 1990 to set aside the order of court. Furthermore it was pointed out to this court that A. Pathmanathan was not authorised to bring an action in the name of the board of trustees. Counsel then cited the case of *P.S. Refson & Co. Ltd. v. Saggers & Anor.* [1984] 3 ALL ER 111 and the case of *Hytrac Conveyors Ltd. v. Conveyors International Ltd.* [1982] 3 ALL ER 415

(2) Prayers (ii) and (iii) were not only reasonable but necessary in the circumstances of the case. They were in fact conceded to and made by consent. This was borne out by the fact that in none of the several affidavits in reply to the defendant's application were prayers (ii) and (iii) challenged.

(3) It was not true that the orders could not be made in the absence of a counterclaim by the defendant. There was no question of the court not having jurisdiction to make the order. The order was made by consent and perfected and the matter rested there. The matter was res judicata and issue estoppel operated. Further as far as prayers (ii) and (iii) were concerned the court was functus officio. Counsel then cited *Malaysian International Merchant Bankers v. Dhanoa Sdn. Bhd* . [1991] 1 CLJ 769

(4) The defendant as the President of the board of trustees of the said temple in fact and in law could not condemn himself and ask for damages against the plaintiffs that is, his own Board! Who else could the defendant seek damages but the person or persons who moved this suit or actively partook in the prosecution of this suit. In this case only one affidavit was filed when the *ex-parte* injunction was obtained by A. Patmanathan and it was against that person that the defendant had to seek damages.

(5) The contention that s. 11 of the 1941 Enactment saved A. Patmanathan from liability was not correct because s. 11 is a saving provision only for a member of the board which A. Patmanathan was not.

Before I proceed to deal with the five points raised by the defendant, it is appropriate that I should first consider the main contention of the plaintiffs namely that the court should not grant the reliefs in respect of prayers (ii) and (iii) on the ground that A. Patmanathan is not a party to this proceeding and that there is no cause of action upon which the injunction restraining A. Patmanathan can be based. I have summarised the arguments of Counsel for the plaintiff and I do not think I need to say anything more regarding her arguments. Apart from the five issues raised by Counsel for the defendant however I should also mention that in support of his reply to the arguments of Counsel for the plaintiffs, Counsel for the defendant cited two cases that is, *Simmons v. Liberal Opinion Ltd.* [1981] KBD 966 and *Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Tower Sdn. Bhd.* [1986] 2 MLJ 41. In addition Counsel drew my attention to the fact that the said board "is a creature of statute viz. Enactment 8 of 1941," and that the plaintiffs had signed the minutes of the meeting of the board produced by the defendant as Exhibit S-2 acknowledging the defendant to be the actual President of the said board. Furthermore Counsel also argued that the appointments of two members of the said board by the attorney general could not be called in question in any court.

With due respect I regret to state that the submission of Counsel for the defendant though well taken up is without any merit. I say so for these reasons. I have no doubt at all that this question of *locus standi* of the plaintiffs cannot be resolved at the threshold of this proceeding particularly in view of the conflicting evidence (see *Wenlock v. Moloney* [1965] 2 ALL ER 871). Here the attorney general himself had, albeit at the instance of the plaintiffs, raised the question as regard to the legality of the appointment of the members of the board of trustees particularly the appointment of the two members namely E. Thavanayagam and S. Ratnasingam. This court is kept in the dark as

to the ultimate decision of the attorney general. Furthermore the plaintiffs through P. Navaratnam who claimed to be the President of the plaintiffs had asserted in his affidavit affirmed on 17th January 1991 that the minutes of the meeting of the said board purported to be held on 15th December 1989 were false. Under the circumstances I repeat that the question of the *locus standi* of the plaintiffs cannot be resolved at this preliminary stage. The two cases cited by Counsel are of no assistance to the defendant.

As to the arguments of the Counsel for plaintiffs, I agree that clearly A. Patmanathan is not a party to this action. The parties cited are "the board of trustees of the Athi Eeswaran Temple as plaintiff" and "P. Santhirasegaram as the defendant." A. Patmanathan merely affirmed an affidavit on 27th November 1990 in support of the plaintiffs' application for the interlocutory injunction as prayed in their summons-in-chambers *Ex Parte* dated the same date. Furthermore A. Patmanathan had asserted in his affidavit that he affirmed the said affidavit not in his personal capacity but in his capacity as the honorary secretary of the said board and that he did so on behalf of the plaintiffs. Finally and more importantly, he gave an undertaking in respect of damages again not in his personal capacity but on behalf of the plaintiffs. That being the case, this court has no jurisdiction to make any order binding on persons who are not parties to the proceeding. Thus it has been said in *Toh Seak Keng v. Lim Huang Cheow & Ors.* [1989] 2 MLJ 492 @ 494

> Counsel for the defendant **quite properly conceded** that when the consent order was made the court in fact **had no jurisdiction to make an order binding on the plaintiffs in that they were not parties in these proceedings,** that is originating petition No. C2/82. (Emphasis supplied).

Now to the second issue raised by Counsel for the plaintiffs that is, no cause of action upon which the defendant could possibly peg the relief (iii) prayed for by him. It is to be noted the said relief prayed for and duly granted to the defendant is in fact an interlocutory injunction restraining A. Patmanathan from representing the said board of trustees. Counsel for the plaintiffs drew my attention to the following comment appearing in p. 500 of the English Supreme Court 1991 Edn:

> The court has jurisdiction to grant a defendant an interlocutory injunction against a plaintiff before any counter claim has been served **but, in such circumstances, the defendant will be required to give an undertaking to serve a counterclaim or to issue a separate writ** in respect of his cross-claim once the plaintiff has served his statement of claim. (Emphasis supplied).

This proposition is fortified by the following passage appearing in the 1990 Vol. 2 of the February Current Law issue under the subject heading of Practice (Civil) paragraph 300:

> Injunction - jurisdiction to grant before service of counterclaim: Even before the service of a counter claim the court may grant a defendant an injunction so long as it obtains **an undertaking** either to a issue (of) a writ or to serve a counterclaim. *Marcus Publishing v. Hutton-Wild Communications,* The Times, 31 October 1989 C.A. (Emphasis supplied).

The reason for requiring the defendant to give an undertaking that he would either issue a writ or to serve a counterclaim if and when the plaintiff has served his statement of claim is simply because of the fundamental rule that the court will grant an interlocutory injunction **only** to support a legal right (per Ormrod J in *Montgomery v. Montgomery* [1965] p. 46). Where the plaintiff has no legal right recognisable by the courts, there is no power to grant him an interlocutory injunction (see *Gouriet v. Union of Post Office Workers* [1977] 3 ALL ER 70). In the present case the defendant has failed to give any such undertaking. That being the case, his request for an interlocutory injunction pursuant to prayer (iii) should not have been entertained. I should mention that Counsel for the defendant cited the *Hytrac Conveyors Ltd.* case (*supra*) to support his contention that as the plaintiffs had failed to serve the statement of claim within time, they were not entitled to the interlocutory injunction applied for by them. It is to be noted that the facts in the *Hytrac Conveyors Ltd.* case are seriously different from the facts in the present case. Here as stated earlier the plaintiffs had filed their writ and statement of claim on 3rd December 1990 that is 6 days after filing their summons-in-chambers for an interlocutory injunction. In fact their writ with the statement of claim was dated 30th November 1990. But due to the delay caused by this court they were not able to extract the sealed copy of the writ together with the statement of claim until much later.

The plaintiffs should not therefore be penalised for the delay in the service of the same on the defendant. In any case the writ with the said statement had already been filed much earlier than the service and the court was at the material time well aware of the matter.

I shall now turn to the 5 points raised by Counsel for the defendant - first to point (1). I took note of the fact that in the affidavit-in-support of the defendant's application affirmed on 9th February 1991 to set aside the *ex-parte* order of court, the defendant had not seriously challenged that the plaintiffs did not file the necessary writ of summons and statement of claim on 3rd December 1990 that is, five days after the issue of the *ex-parte* order of court. His only complaint was that the plaintiffs had failed to serve the said writ and statement of claim on the defendant and that the excuse given by them only proved bad faith on the part of the plaintiffs. However that may be it is important to note that the defendant likewise has not seriously challenged the claim that the plaintiffs were not able to extract the sealed copy of the said writ and the statement of claim because of the delay caused by the court. In the circumstances I am satisfied that the delay in the service of the writ and statement of claim is not entirely due to the fault of the plaintiffs and, as stated earlier, they should not be penalised. Likewise I am satisfied that no bad faith can be imputed to the plaintiffs. As the plaintiffs had filed the writ and statement of claim within reasonable time and the delay in effecting service of the same cannot be said to be caused by them, the principle enunciated in P.S. Refson & Co. Ltd. and Hytrac Conveyors Ltd. cited by the defendant is not relevant. Point (1) is therefore rejected.

With regard to point (2), the short answer is that there is no indication at all that the previous Counsel for the plaintiffs who argued on behalf of the plaintiffs at the hearing in chambers on 21st January 1991 had ever made any concession in respect of prayers (ii) and (iii). Indeed Counsel for the defendant himself did not even make any serious submission to support the said prayers. His submission was substantially directed to his contention that the plaintiffs failed to disclose material facts and to a certain extent, to support his contention concerning the delay on the part of the plaintiffs to file a writ and statement of claim. I should also mention that there is no record whatsoever of any serious arguments by both Counsel regarding to prayers (ii) and (iii). There is certainly no record that the then Counsel for the plaintiffs had consented to prayers (ii) and (iii). In any case assuming without deciding that prayers (ii) and (iii) might not only be reasonable but necessary it certainly does not mean that I should ignore the submission of Counsel for the plaintiffs on this point at the hearing of further arguments. O. 56 r. 2 of the Rules of High Court 1980 empowers me to make such order as I feel just after hearing further arguments. Point (2) is likewise rejected.

As to point (3), I must reiterate that no order of court was ever made by consent at the hearing in chambers held on 21st January 1991. The principles of res judicata and issue estoppel therefore have no application whatsoever. Furthermore I certainly cannot agree that after making the order of court of 21st January 1991 on a hearing in chambers this court is functus officio. The said order is certainly not a final order but rather subject to review pursuant to O. 56 r. 2 of the Rules of the High Court should I deem it fit to hear further arguments, as I have done in the present case, on the matter. The only authority cited by Counsel for the defendant at the chambers hearing was the case of *International Merchant Bankers v. Dhanoa Sdn. Bhd.* (*supra*) where I held that this court had no jurisdiction to vary an order of court made by consent upon the subsequent application by the party which application was strongly opposed by the other party. Clearly that case is distinguishable and has no relevancy to the facts of the present case. Turning to point (4), again the short answer is that I agree with Counsel for the plaintiffs when he submitted that in making the following statement:

> ... the defendant, as the President of the board of trustees of the Athi Eeswaran Temple, in fact and in law, cannot condemn himself and ask for damages against the plaintiffs that is, his own board!,

the defendant was in fact prejudging the very issue that could only be resolved at the trial of the case proper. In this connection it should be noted that the plaintiffs in this action are claiming that the members of the board of trustees of the said temple comprised of:

(i) P. Navaratnam - President
(ii) Patmanathan - Setiausaha Kehormat/ Bendahari
(iii) Dato' T. Thuru Magnanam
(iv) Dr. N. Visveswaran
(v) T. Kandasamy - (see the affidavit of P. Navaratnam affirmed on 17th January 1991 enclosure 13).

Furthermore from the several affidavits affirmed by A. Patmanathan and the other 3 members, the plaintiffs persisted in claiming that the members of the Board of Trustees were as stated above. Indeed one V. Gunaratnam, whom the defendant said in his affidavit-in-support of his application to set aside the order of court dated 21 January 1991, was and still is a member of the board of trustees had been alleged by members of the plaintiffs to have accepted as a fact ("menyedari bahawa") that P. Navaratnam was President of the Board of Trustees. That being the case, the question as to who were or are actually the members of the said board is not a straightforward question to which an answer can be found at this interlocutory stage. It follows therefore this court cannot accept the conclusion arrived at by Counsel for the defendant (See *Wenlock v. Moloney (supra)* and point 4 is likewise rejected.

Now to point (5). That s. 11 of the 1941 Enactment is a saving provision only for a member of the board of trustees of the said temple is axiomatic and certainly no one can dispute that. The crucial question, however, is whether at the material time A. Patmanathan was a honorary secretary/Treasurer of the said board? In view of the allegations, counter-allegations, claims and counter-claims averred in the several affidavits filed in support of the case for the plaintiffs and the several affidavits in support of the case for the defendant it is certainly extremely difficult if not impossible to find an answer to this question at this stage. For example the defendant has produced a gazette notification No. 10891 which is annexed as exhibit 'S-4' to his further affidavit affirmed on 16th January 1991 (enclosure 10) showing what purported to be the names of the members of the said board amongst which are the names of E. Thavanayagam Ratnasingam both described as members of the board and the name of V. Gunaratnam who was described as setiausaha/bendahari of the board. It is to be noted that the said gazette notification was published on 6th December 1990. A. Patmanathan on the other hand had produced a letter written by the attorney general which is marked as exhibit "PA-2" annexed to his affidavit affirmed on 16th January 1991 (enclosure 11). It is to be noted that the said letter was dated 12th December 1990 and addressed to *inter alia* E. Thavanayagam and S. Ratnasingam. By that letter the attorney general indicated that A. Patmanathan had produced document to challenge the appointment of E. Thavanayagam and S. Ratnasingam as members of the said board. What is more important is that the attorney general also indicated that P.S. Chandran who in the circumstances of this case must be an associate of the defendant had suppressed certain facts regarding the appointment of the secretary of the said board. The attorney general therefore ended his letter with the following words:

> Jikalau kami tidak menerima apa-apa jawapan di dalam tempoh tujuh hari daripada tarikh penerimaan surat ini, perlantikan-perlantikan tersebut diatas akan dibatalkan.

This letter of the attorney general is sufficient to support the proposition that the issue regarding who in fact were or are the lawful members of the said board cannot be resolved at this preliminary stage. Furthermore affidavit evidence has also been adduced by the plaintiffs to show that there were at the material times indications that this P.S. Chandran had acknowledged P. Navaratnam as the President of the said board. Again this evidence must certainly fortify the aforementioned proposition. It is therefore futile for the Counsel to state or even suggest that A. Patmanathan is never appointed as the honorary secretary of the said board. To compound the confusion I may add that while the defendant alleged that the office of secretary-General which A. Patmanathan had conferred on himself was non-existent, it is to be noted that from the affidavit evidence the plaintiffs have at least at this stage sufficiently established that the post to which A. Pathmanathan was said to be holding was "setiausaha/bendahari kehormat." There is no dispute that the post of setiausaha/ bendahari was and I take it is still existing. For the aforesaid reasons the proposition raised on point 5 cannot be accepted.